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No. 01-1548

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHELBY COUNTY SCHOOL DISTRICT;
LEON MOONEYHAN, Officially and Individually;
BRUCE SLATE, Officially and Individually,

Petitioners,

v.

DONNA COCKREL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Donna Cockrel (Cockrel) was a tenured fifth grade teacher at Simpsonville Elementary School in the Shelby County School District in Kentucky. For several years prior to 1996, with the knowledge and approval of her superiors, Cockrel regularly taught, and invited outside speakers to address her class on the history, characteristics, environmental benefits, production, and commercial uses of nontraditional "alternative" agricultural cash crops such as zenaf, flax, soybeans and industrial hemp. Her superiors also knew that her outside speakers included advocates for growing industrial hemp in Kentucky. Prior to 1996, Cockrel received excellent teaching evaluations and commendations from Simpsonville Elementary School Principal Bruce Slate (Slate) for her innovative teaching methods. [Record (R.) 1, Joint Appendix (J.A.) pp. 8-10; R. 20, J.A. pp. 145-147, Exhibits (Exhs.) 2, 3, J.A. pp. 216, 241; R. 22, J.A. pp. 90-91; Petition For Writ Of Certiorari (Pet.), Appendix (App.) 1, pp. 2, 4].

For her end of the school year project on the last day of class in academic year 1995-96, Cockrel chose the topic of "Saving the Trees." Her planned lesson for that day was to teach about using industrial hemp fibers rather than wood pulp to make paper and cloth. Thereafter, on April 9, 1996, Cockrel was contacted by a representative of the Cable News Network (CNN) about CNN coming to Kentucky and possibly visiting her classroom in connection with a planned television program on "Saving the Trees." Cockrel immediately notified Slate about CNN's possible visit to her classroom on the proposed program, and he approved the visit. [R. 1, J.A. p. 11; R. 22, J.A. pp. 92-93; R. 20, J.A. p. 148; App. 1, p. 4].

In early May 1996, the president of the Kentucky Hemp Growers Association (KHGA) informed Cockrel that movie actor Woody Harrelson (Harrelson) would be visiting Kentucky and he also might be able to visit her classroom with CNN on the last day of school. About 9:00 a.m. on May 30, 1996 (the last school day), the KHGA president told Cockrel by telephone that CNN and Harrelson would in fact visit her classroom that day at about 10:15 a.m. Cockrel immediately informed Slate of CNN and Harrelson's impending visit. Slate approved the visit. [R. 1, J.A. pp. 11-12; R. 22, J.A. pp. 94-97; R. 20, J.A. pp. 149-51; App. 1, p. 4].

At the appointed time, several vans arrived at Cockrel's school, carrying Harrelson, KHGA members, several hemp growers from foreign countries, CNN, and various Kentucky news media representatives. In Cockrel's classroom, Harrelson and the visitors made presentations to the class describing and advocating the use of industrial hemp in the manufacture of paper, cloth, and other commercial products. Cockrel actively participated in and endorsed the message and lesson of the presentation, which was videotaped by CNN and other national and local news media. The proceedings did not unduly disrupt the school routine. [R. 1, J.A. pp. 12-13; R. 22, J.A. p. 98; R. 20, J.A. pp. 152-53; App. 1, p. 5].

The visit by CNN and Harrelson to Cockrel's classroom and the presentations on industrial hemp were widely publicized by the news media throughout Kentucky and the United States. Immediately afterward, several parents, teachers, and school employees wrote complaint letters to Shelby County School Superintendent Leon Mooneyhan (Mooneyhan) objecting to the industrial hemp

presentation in Cockrel's classroom. [R. 1, J.A. pp. 13-14; R. 20, J.A. pp. 154-57, Exh. 4, J.A. p. 243; App. 1, p. 5].

Upon receiving the complaint letters, Mooneyhan ordered the Shelby County school board attorney to investigate Cockrel's actions relating to the visit by CNN and Harrelson. Simultaneously, Slate had the school policy relating to outside visitors regarding "controversial" matters changed to require five (5) days advance notice to and approval by the principal, a description of the visit's curricular purpose, two (2) days advance written notice to the parents of children affected, and written consent from them for their children to participate in the "controversial" classroom session. [R. 1, J.A. p. 14; R. 22, J.A. pp. 102-03; R. 21, J.A. pp. 111-19; R. 23, J.A. p. 120, Exhs. 8, 12, 13, J.A. pp. 276, 279, 283; R. 22, Exh. 6, J.A. p. 256; App. 1, pp. 6-7]. Mooneyhan subsequently threatened Cockrel that it would not be in her "best interest" for Harrelson to visit her classroom again. Likewise, Slate warned Cockrel that any discussions of industrial hemp by outside visitors to her classroom in the future would be deemed "controversial." [R. 1, J.A. p. 15; R. 20, J.A. p. 174; R. 22, J.A. pp. 104-06; App. 1, pp. 7, 8].

Based on the school board attorney's investigation, Mooneyhan formally reprimanded Cockrel on September 3, 1996, regarding the visit of CNN and Harrelson to her classroom. He also reported Cockrel to the Kentucky Educational Professional Standards Board (KEPSB) seeking – unsuccessfully – revocation of her teaching certificate for permitting hemp seeds to be shown to her class during the CNN/Harrelson visit. For his part, Slate scheduled an irregular teacher evaluation of Cockrel for academic year 1996-97, and observed her in the classroom. In his first teacher observation report, Slate gave her – for

the first time in her teaching career – an adverse rating. [R. 1, J.A. pp. 15-16; R. 20, J.A. pp. 159, 164, 165, Exh. 6, J.A. p. 256; R. 23, J.A. pp. 121-39, Exhs. 14, 15, 17, 18, J.A. pp. 285, 286, 288, 289; App. 1, pp. 6 n 1, 8].

On January 14, 1997, CNN requested and received permission from Slate to visit Cockrel's class a second time. For this visit, Slate drafted a public statement, which he read on camera. In his statement, he said that although "teaching about hemp . . . has educational value," Cockrel had experienced "problems" with petitioners, including him, about her teaching "methods." [R. 1, J.A. p. 16; R. 20, J.A. pp. 167-171, Exh. 7, J.A. p. 264; App. 1, p. 8].

Cockrel requested, and Slate also approved, a second visit by Harrelson to Cockrel's classroom on January 22, 1997, to talk about industrial hemp. For Harrelson's second visit, Cockrel duly complied with the revised policy for hosting visiting speakers on "controversial" topics. Harrelson was unable to come on January 22, however, and Cockrel duly notified Slate that Harrelson would not be visiting that day. Nevertheless, on January 22, outside protesters accompanied by local news media arrived at Slate's office, blocked the halls, and loudly voiced objections to Harrelson and Cockrel speaking about industrial hemp in her classroom. [R. 1, J.A. pp. 16-17; R. 20, J.A. pp. 175-183; App. 1, pp. 6, 7].

Harrelson rescheduled his visit for January 29, 1997, and Cockrel again fully complied with the new school policy. On his second visit, Harrelson was accompanied by local news media and representatives of the Columbia Broadcasting System. Outside demonstrators carrying signs met Harrelson on the school grounds, blocked the

schoolhouse door and hallways, and loudly objected to Cockrel and Harrelson speaking in favor of industrial hemp in her classroom. They delayed Harrelson from entering the school, disrupted Cockrel's classroom presentation, and loudly heckled them in the hallway and on the school grounds. Slate was present throughout this display and did nothing to control the demonstration. Despite this disruption, Cockrel followed her regular class schedule. [R. 1, J.A. pp. 16-17; R. 22, J.A. pp. 107-08; R. 23, Exh. 20, J.A. p. 290; R. 20, J.A. pp. 172-73, 186-94, Exh. 7, J.A. p. 264; App. 1, p. 7].

These events were reported, videotaped, and disseminated by the broadcast and print news media locally, statewide, and nationally. During February 1997, CNN telecast globally a TV segment entitled "Cannabis Controversy" about both Harrelson visits to Cockrel's classroom on its television news magazine programs. [R. 1, J.A. p. 18; App. 1, pp. 5, 7].

After Harrelson's second visit, several persons again wrote complaint letters to Mooneyhan objecting to Cockrel and Harrelson speaking on industrial hemp in her classroom. On February 12, 1997, Slate made a second teacher observation visit to Cockrel's classroom and again rated her adversely. A week later, on February 20, 1997, the Shelby County School District Parent Teachers' Association (PTA) adopted a position statement calling on Mooneyhan to discharge Cockrel for teaching her students about industrial hemp and allowing Harrelson to speak about it in her classroom. [R. 1, J.A. pp. 17-18; R. 22, J.A. p. 109; R. 20, J.A. pp. 194-01, Exhs. 8, 9, J.A. pp. 266-73, 274; R. 23, J.A. pp. 140-41, Exh. 32, J.A. p. 291; App. 1, pp. 7, 9-10].

On March 26, 1997, Slate issued his summative teacher evaluation of Cockrel, rated her adversely, and recommended she be fired. He attached to his evaluation the various complaint letters he and Mooneyhan had received. On July 15, 1997, Mooneyhan terminated Cockrel's employment in a letter containing seventeen (17) paragraphs of administrative charges against her. Four (4) of these charges related to Harrelson's visits to Cockrel's classroom on May 30, 1996, and January 29, 1997. [R. 1, J.A. p. 19; R. 23, J.A. p. 142, Exh. 34, J.A. p. 345; App. 1, pp. 10-11, 70-71, 75].

Simultaneously, Mooneyhan sent a copy of Cockrel's termination letter to the KEPSB as a basis for suspension of Cockrel's teaching certificate. Two (2) years later, on March 11, 1999, KEPSB and Cockrel entered into an agreed order in which Cockrel voluntarily surrendered her Kentucky teaching certificate retroactively for two (2) years from June 30, 1997 to June 30, 1999, and agreed to a two (2) year suspension from July 1, 1999, to July 1, 2001. [App. 1, p. 11].

On June 4, 1998, Cockrel filed an action in the United States District Court for the Eastern District of Kentucky, charging the Shelby County School District, Mooneyhan, and Slate with violating her constitutional rights under the First Amendment in violation of 42 U.S.C. §1983, and with breach of her teaching contract under state law. After limited discovery, petitioners moved for summary judgment. The District Court granted summary judgment, abstained from ruling on Cockrel's state claims, and dismissed Cockrel's constitutional claim on the grounds that her actions were not a "form of speech" protected by the First Amendment as a matter of law. [App. 1, pp. 11-

12, 45-57]. Cockrel appealed to the United States Court of Appeals for the Sixth Circuit.

On appeal, the Sixth Circuit held that Cockrel's actions constituted speech within the ambit of the First Amendment under *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U. S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) and *Schad v. Borough of Mount Ephraim*, 452 U. S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), and because she had an intent to convey a particularized message about industrial hemp to her students. Moreover, the appellate court held that Cockrel was entitled under the First Amendment to speak about industrial hemp in her classroom because the subject is a matter of public concern under *Connick v. Myers*, 461 U. S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and that her right to speak on that matter outweighed the efficiency of the public services her school provides under *Pickering v. Bd. of Educ.*, 391 U. S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Finally, the appellate court determined there was a material dispute of fact over whether a substantial or motivating factor in Cockrel's discharge was her exercise of First Amendment rights under *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The appellate court reversed and remanded the case for trial. [App. 1, pp. 2-44].

SUMMARY OF THE ARGUMENT

There is no conflict among the circuits regarding the application of *Connick v. Meyers, supra,* concerning a "matter of public concern" on the facts here. Petitioners seek only to have this Court correct alleged errors in the

appellate court decision. The decision below does not merit review by this Court to insure uniformity of law throughout the United States.

ARGUMENT

-I-

THERE IS NO CONFLICT AMONG CIRCUITS PRESENTED HERE REGARDING "MATTERS OF PUBLIC CONCERN"

The appellate court held that, under *Connick v. Myers*, *supra*, Cockrel's classroom presentations touched on "a matter of public concern." [App. 1, pp. 23-24]. The court found that her classroom speech concerning industrial hemp in Kentucky "most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest." [App. 1, p. 26]. The court rejected petitioners' contention that Cockrel's speech was not on "a matter of public concern" as a matter of law because it was curricular speech by a public school teacher in her classroom. [App. 1, pp. 25-26].

Petitioners assert here that the appellate court decision conflicts with *Kirkland v. Northside Indep. Sch. Dist.*, 890 F. 2d 794 (5th Cir. 1989), *cert. denied*, 496 U. S. 926 (1990), and *Boring v. Buncombe County Bd. of Educ.*, 136 F. 3d 364 (4th Cir.) (en banc), *cert. denied*, 525 U. S. 813 (1998). [Pet., pp. 10-14]. To the contrary, there is no conflict among circuits regarding what constitutes "a matter of public concern" under *Connick* on the facts here.

There is certainly no doctrinal conflict between this case and *Kirkland* or *Boring*. All three were decided under

Connick. All three courts determined on the entire record before them whether the particular speech involved was of public or private interest based on its content, form and context under the analysis and standards prescribed by *Connick*. *Kirkland v. Northside Indep. Sch. Dist.*, *supra*, p. 799; *Boring v. Buncombe County Bd. of Educ.*, *supra*, pp. 368-369, 372 (Luttig J., concurring); [App. 1, pp. 22-23]. These decisions do not "conflict" with each other in terms of their jurisprudence, decisional criteria or analytical methodology.

More importantly, there is no conflict in these decisions regarding their outcomes. These appellate courts properly reached different conclusions on whether the particular speech at issue was "on a matter of public concern." *Kirkland* and *Boring* are distinguishable from this case on their constitutionally relevant facts. The content, form, and context of the speech in those cases were fundamentally different from the speech in this case.

In *Kirkland*, the Fifth Circuit held that a teacher's use of a nonapproved supplemental reading list for his world history class – popular fiction – was only a matter of his private interest. *Kirkland v. Northside Indep. Sch. Dist.*, *supra*, p. 794. The court found that neither the teacher's use of the list nor alleged "book" or "ideological" censorship by the school were a matter of public concern in that community. Thus, the matter was only a private dispute under *Connick*. *Ibid.*, pp. 800-802. Similarly, in *Boring*, the Fourth Circuit held that a teacher's selection of the play "Independence" – about a dysfunctional family – for her four (4) students to perform was not a matter of public concern. *Boring v. Buncombe County Bd. of Educ.*, *supra*, p. 368. The court held that her play selection reflected only her "personal, political, and other views." *Ibid.*, p. 372

(Luttig J., concurring). The case was thus an ordinary private dispute under *Connick*. *Ibid.*

This case, on the other hand, was not a mere private dispute. The Sixth Circuit held that Cockrel's classroom "presentations" about industrial hemp "most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest." The appellate court found the subject of industrial hemp was "politically charged and of great concern" in Kentucky, a fact amply reflected in public media accounts which "only scratched the surface." [App. 1, pp. 23-26].

Moreover, the context in which speech occurred in these cases was fundamentally different. The teacher in *Kirkland* deliberately avoided the school's public administrative process for approval of such curricular materials. He pointedly claimed at trial that his control of the curriculum of his world history class was "unlimited" under the First Amendment. *Kirkland v. Northside Indep. Sch. Dist.*, *supra*, pp. 801-803. Similarly, the teacher in *Boring* "failed to follow the school system's controversial materials policy." *Boring v. Buncombe County Bd. of Educ.*, *supra*, pp. 367, 369 (quoting from *Kirkland*: [she] "disregard[ed] . . . [the school's] . . . administrative process"). She also claimed she had a First Amendment right to "insist on the makeup of the curriculum." *Ibid.*, p. 370.

In stark contrast, in this case, Cockrel dutifully complied with school administrative policies regarding her class curriculum. With Slate's knowledge and approval, Cockrel taught industrial hemp segments to her classes using outside speakers as part of her regular approved curriculum. Unlike in *Kirkland*, Cockrel complied with

school administrative procedure regarding Harrelson's first visit, and scrupulously complied twice with the new "controversial" visitor policy for Harrelson's second visit. Slate approved the first CNN/Harrelson visit, and he and Mooneyhan both approved the second CNN and Harrelson visits. [App. 1, pp. 4-8, 21, 43 ("the school in advance approved the subject matter and the speaker . . . [i]t now must pay the price for giving prior approval") (Siler J., concurring.)]. Also unlike the teachers in *Kirkland* and *Boring*, Cockrel has never claimed she has a First Amendment right unilaterally to dictate her class curriculum.

In the final analysis, the decision below is not in conflict with the decisions of other circuits. There is no conflict among the circuits warranting certiorari review merely because, applying *Connick,* they reach different conclusions based on the content, form, and context of the particular speech at issue. Different facts simply lead the Sixth Circuit to a different conclusion from the Fourth and Fifth circuits on the public concern – private interest issue. Thus, this case is inappropriate for certiorari review.

The facts overwhelmingly support the decision below, *Connick* was properly applied, and the "public concern" issue here would be decided the same way by other courts, including the Fourth and Fifth Circuits. There is no compelling reason to grant certiorari review.

The Court should deny the petition.

-II-

THE APPELLATE COURT'S "PARTICULARIZED BALANCING" DOES NOT "CONFLICT" WITH *PICKERING* OR *CONNICK*

The appellate court held Cockrel's speech constitutionally protected "because the balancing of interests under *Pickering* weighs in her favor." [App. 1, p. 32]. In reaching that conclusion, the appellate court reviewed the constitutionally relevant facts, and weighed Cockrel's interest in speaking on an important matter of public concern against the school district's interest in "an efficient operation of the school and a harmonious work environment." [App. 1, pp. 28-31]. In that particularized balancing, the appellate court properly required the school district to make a "strong showing" to outweigh Cockrel's free speech interest. In that regard, the court held the school district's reliance upon the "outcry within the school community" to support its position was misplaced because that outcry was traceable to the school district's prior approval of the speech and speaker. Consequently, that factor carried little weight in the *Pickering* balance. *Ibid.*

Petitioners assert the ruling below "conflicts" with *Pickering* and *Connick* because the appellate court erred by requiring the school district to make a showing of disruption directly caused by Cockrel's speech, [Pet., pp. 15-16], and that it incorrectly weighed *Mt. Healthy* "motivation" factors on the "threshold" *Pickering* issue, thereby improperly "merging" the *Pickering* and *Mt. Healthy* analyses. [Pet., pp. 17-18]. Petitioners are wrong, but, in any event, they merely disagree with the appellate court's legal conclusions in identifying and weighing the relevant

factors in striking the "Pickering Balance." Their objections do not present important issues requiring review by this Court.

There is no compelling reason to grant a writ of certiorari to review those alleged errors by the appellate court and the petition should be denied.

-III-

THE APPELLATE COURT DECISION DOES NOT "CONFLICT" WITH THE *MT. HEALTHY* CAUSATION STANDARD

The appellate court held there was a material dispute of fact whether the school district's termination decision was motivated in part by Cockrel's classroom speech about industrial hemp. [App. 1, p. 42]. The court noted there is a "substantially higher" summary judgment burden of persuasion on a moving party who has the burden of proof on an issue at trial. In addition, under *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999), summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." [App. 1, p. 36]. Under this standard, the appellate court held petitioners failed to carry their burden of persuasion to rebut Cockrel's claim of pretext since the court was not confident that Cockrel's termination was *not* caused in part by her protected speech. [App. 1, p. 42].

In reaching this conclusion, the appellate court noted that the evidence showed Mooneyhan had Cockrel investigated after the first CNN/Harrelson visit, and threatened her if she invited Harrelson for a second visit. The court

also noted evidence that Slate singled Cockrel out for special teacher evaluations after each of the CNN and Harrelson visits, and that his adverse summative evaluation and firing recommendation, with attached letters complaining of her hemp presentations, was a factor in Mooneyhan's decision to terminate her. This evidence established Cockrel's *prima facie* case under *Mt. Healthy*. *Ibid.*

Reviewing petitioners' rebuttal evidence, the appellate court noted that they claim Cockrel was discharged solely because of the seventeen (17) administrative infractions charged in Mooneyhan's termination letter. [App. 1, pp. 68-76]. However, the court observed that some of these alleged infractions were trivial and would not justify termination, and most had occurred years before the first CNN/Harrelson visit. Mooneyhan had neither known about the infractions at the time they occurred, nor had Cockrel previously been disciplined for them. [App. 1, pp. 37-39, 41-42]. The court held that there was a clear material dispute of fact over Mooneyhan's threat to Cockrel about a second Harrelson visit – which he denies making. Together with the circumstances of Mooneyhan's investigation and reprimand, Slate's classroom visits and summative evaluation, and the complaint letters and PTA resolution – all relating to Cockrel's classroom hemp presentations – the court held "a reasonable jury could find, by a preponderance of the evidence, that Cockrel would not have been terminated had she not engaged in constitutionally protected activity." [App. 1, p. 42].

Petitioners assert that the lower court erred by imposing too heavy a summary judgment burden on the school district, failed to find that Cockrel did not establish a *prima facie* case of pretext, and claim the school district

carried its "burden of rebuttal" under *Mt. Healthy* as a matter of law. They base those contentions on Cockrel's failure to challenge the alleged administrative infractions in state administrative and judicial appeals. Petitioners argue that Cockrel's retroactive surrender of her teaching certificate disqualified her from teaching as of June 30, 1997, and therefore, as a matter of law, no reasonable jury could find otherwise than that Cockrel would have been terminated even in the absence of her protected speech. [Pet., pp. 19-21].

The appellate court rejected this convoluted contention when presented by petitioners as the basis for collateral estoppel. [App. 1, pp. 13-14]. It is equally flawed as a basis for judgment as a matter of law under *Mt. Healthy*. Factually, petitioners' "motivation" to fire Cockrel on June 30, 1997, could not have been based on surrender of her teaching certificate which did not occur until two (2) years later on March 11, 1999.

In sum, nothing in the appellate court decision "conflicts" with *Mt. Healthy*. There is ample evidence of record to support the Sixth Circuit decision, that court applied the correct standard under *Mt. Healthy*, and there was no procedural or substantive error in the court's causation analysis. This Court should not "correct" the decision, and there is no law for this Court to "clarify" here.

The Court should deny the petition for certiorari review.

CONCLUSION

Petitioners assert the decision below is "squarely at odds with *Connick*," [Pet., p. 13], that it "runs afoul" of the *Pickering* balancing test," [Pet., p. 16], and that it "conflicts with the *Mt. Healthy* causation standard." [Pet., p. 18]. The petition seeks only review of alleged appellate court errors. There is no conflict among circuits presented here for this Court to resolve. None of petitioners' contentions raise a compelling matter requiring certiorari review.

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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